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Sommers v. Commonwealth: An Indigent Criminal Defendant's Right to Publicly Funded Expert Assistance Other than the Assistance of Counsel

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In Defense of the Outrageous Government Conduct Defense in the Federal Courts*

INTRODUCTION

A. *The Sting*

Visualize yourself as the successful owner of a small business¹ receiving a visit from a friend whom you have known for more than ten years. The friend tells you about the miserable state into which her life has fallen. She describes her desperate financial situation and tells you that she will have to sell her family's food stamps to buy Christmas presents for her children. You tell her that you feel sorry for her, but when she asks you to buy the food stamps, you resist the temptation and refuse.

Then you are stunned when the same friend appears at your place of business dressed in rags. Once again, she tells you about her urgent need for cash. Finally, out of pity for your old friend, and perhaps fear that your business will be disrupted again, you agree to pay her for the food stamps. One of your employees also listens to her sad tale of poor health and mounting financial problems. The employee also agrees to help out by buying the food stamps for cash.

Once the sales have been completed, your friend tells you and your employee that she has been recording your conversations and that she is an undercover operative for the United States Department of Agriculture. You are arrested by federal law enforcement officials. Later, you find out that as payment for her work as an operative, your friend was allowed to keep half of all the money she got from people like you. You wonder

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¹ The facts described in this hypothetical reflect the facts of *United States v. Tucker*, 28 F.3d 1420 (6th Cir. 1994) (holding that the defense of outrageous government conduct is no longer viable in the Sixth Circuit), *cert. denied*, 115 S. Ct. 1426 (1995). For discussion of this case, see *infra* notes 145-75 and accompanying text.

how or why she came to you to set you up for an arrest on federal charges of trafficking in food stamps. You puzzle over how you fell for her phony story — why did you allow your affection or pity for an old friend to cloud your judgment so? What's more, you are also charged with aiding and abetting the illegal food stamp trafficking because your employee became involved.

A few days later, you begin to think more about the big picture. Is the crime of trafficking in food stamps really so heinous or rampant that the federal government needs to spend money tricking people into committing it? Should a paid agent of the law enforcement authorities be able to randomly pick out people to set up like this? Should she be making money based on how many people she convinces to commit crime?

Then, you really start thinking about what will happen to you. You know you committed the crime, but is there any defense available to you? Will it matter that your case will be tried in the Sixth Circuit as opposed to any other federal circuit?

B. The Interests at Stake

In the above hypothetical, the government's agent may have chosen the target of her sting simply because the agent believed her to be vulnerable to such emotional appeals, or because she had a personal vendetta against her, because her name was the next in the agent's address book, or because the agent had a valid reason to believe that, given the opportunity, the targeted person would participate in illegal activity. In the federal court system, it would not matter which, if any of these, was the reason for the agent's targeting decision. It does not matter that the agent was paid on a contingent fee basis for successfully convincing targets to buy food stamps illegally. Nor does it matter that the target initially resisted the offer but later gave in because of friendship or sympathy. The only issue that determines the availability of an entrapment defense to a defendant targeted in a sting is whether she was predisposed to commit the offense.

Contrary to the current state of federal law, the people of the United States have an interest in preventing capricious targeting of defendants in sting operations.² If defendants are punished and government agents are not sanctioned in any way, all of society suffers. Society and the courts are essentially condoning the practice of manufacturing crime. Without inquiry into the reasons for targeting defendants, the courts leave the door open to abuse. By focusing on the predisposition of defendants rather than on the

² *Rochin v. California*, 342 U.S. 165, 169 (1952); see *infra* notes 54-66 and accompanying text.

conduct of government agents, the government implies that it is better to manufacture crime and catch criminals than to refrain from manufacturing crime and risk missing some.

This is, however, a false dilemma.³ Society and the courts do not have to choose between manufacturing crime and letting criminals go free; they could catch criminals without manufacturing crime and at the same time maintain an objective check on the conduct of the agents.⁴ One simple approach would be a per se prohibition on government involvement in sting operations. Such a rule would be impractical, however, because it is difficult to detect consensual crime without government infiltration of criminal activity. A more practical, as well as more equitable, solution would be to require that the government only target someone when it can demonstrate some reasonable basis for believing that person was already planning to commit crime. This could be accomplished by excluding evidence obtained in an undercover sting where the agents lacked reasonable suspicion to target the defendant.

C. *Focus of this Note*

This Note will examine how the federal courts have addressed the due process defense of outrageous government conduct. Since this defense has developed predominately as a corollary to the defense of entrapment, the Note begins with a preliminary review of the entrapment defense.⁵ The Note then explores the contours of the due process defense as it has developed in the federal courts, focusing on the level of suspicion required before a defendant may be targeted.⁶ It will examine a recent decision involving the defense⁷ and conclude by suggesting a limitation on the conduct of government agents

³ See Paul Marcus, *The Due Process Defense in Entrapment Cases: The Journey Back*, 27 AM. CRIM. L. REV. 457, 462 (1990) ("We should not permit the government to prosecute individuals where the government conduct itself was outrageous or egregious. We should not permit such prosecutions, not because a particular person's rights were violated, but rather because such government activity, in Justice Frankfurter's words, does 'more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience.'" (quoting *Rochin*, 342 U.S. at 172)).

⁴ In his concurring opinion in *United States v. Miller*, 891 F.2d 1265, 1271 (7th Cir. 1989) (Easterbrook, J., concurring), cited in Marcus, *supra* note 3, at 463, Judge Easterbrook phrased the [false] dilemma this way: "When push comes to shove, we should reject the contention that the criminal must go free because the constable was too zealous."

⁵ See *infra* notes 9-50 and accompanying text.

⁶ See *infra* notes 51-144 and accompanying text.

⁷ See *infra* notes 145-75 and accompanying text.

in sting operations that has been left open by the United States Supreme Court.⁸

I. A REVIEW OF THE FEDERAL ENTRAPMENT DEFENSE

A. *Historical Background*

Entrapment is an affirmative defense based on the idea that a defendant was induced to commit the crime by a government agent. The defense was neither recognized by English law nor by early American law.⁹ In this century, however, American courts have accepted the defense in a variety of criminal prosecutions.¹⁰ The defense was brought to the notice of the public because of the extensive media coverage it received when it was raised in the "Abscam" cases¹¹ and in the prosecution of millionaire John DeLorean.¹²

⁸ See *infra* notes 176-83 and accompanying text.

⁹ One nineteenth century American court concluded:

Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the plea as ancient as the world, and first interposed in Paradise: "The serpent beguiled me and I did eat." That defence was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say christian ethics, it never will.

Board of Comm'rs v. Backus, 29 How. Pr. 33, 42 (N.Y. Sup. Ct. 1864) (Bacon, J.), quoted in YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 399 (8th ed. 1994).

¹⁰ The first federal court recognition of the defense was in *Woo Wai v. United States*, 223 F. 412, 415-16 (9th Cir. 1915). For a comprehensive history of the defense in federal courts up to 1982, see S. REP. NO. 307, 97th Cong., 1st Sess. § 501.9 (1981), microformed on CIS No. 82-S523-1 (Congressional Info. Serv.).

¹¹ Abscam "is an acronym combining the first two letters of Abdul Enterprises, Ltd., a fictitious Middle Eastern corporation, and the word 'scam,' . . ." Bennett L. Gershman, *Abscam, the Judiciary, and the Ethics of Entrapment*, 91 YALE L.J. 1565, 1565 n.1 (1982). The FBI formed Abscam "as a front to receive stolen property," *id.*, and, later used Abscam to offer bribes to U.S. Congressmen, *id.*, bringing widespread attention to the defense of entrapment, which was offered by the defendants. See, e.g., *United States v. Kelly*, 707 F.2d 1460 (D.C. Cir.), *cert. denied*, 464 U.S. 908 (1983). For analysis of the Abscam cases and a complete list of Abscam case cites, see Maura F.J. Whelan, Comment, *Lead Us Not into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense with a Reasonable Suspicion Requirement*, 133 U. PA. L. REV. 1193, 1193 n.5, 1200-03 (1985).

¹² John DeLorean was prosecuted in federal court and acquitted based on the defense of entrapment. The jury was instructed to apply the subjective test for entrapment. See *infra* notes 25-30 and accompanying text. Apparently, the jurors instead applied an objective test and acquitted him because of their distaste for the government's methods.

Entrapment is a common law defense as there is no statutory definition of it.¹³ The defense is often raised in drug-related offenses,¹⁴ and it has recently been raised in prosecutions for other consensual crimes,¹⁵ such as receiving child pornography through the mail,¹⁶ bribery,¹⁷ money laundering,¹⁸ and trafficking in food stamps.¹⁹

Government encouragement to commit a crime is not prohibited per se. For example, merely setting a trap to ensnare a criminal is not entrapment.²⁰ As Chief Justice Warren's often repeated test describes it:

For a description of the DeLorean case, see Whelan, *supra* note 11, at 1197-1200.

¹³ See *United States v. Russell*, 411 U.S. 423, 442 & n.1 (1973) (Stewart, J., dissenting); *Sorrells v. United States*, 287 U.S. 435, 441-45 (1932); S. REP. NO. 307, *supra* note 10, at 127; see also Fred W. Bennett, *From Sorrells to Jacobson: Reflections on Six Decades of Entrapment Law, and Related Defenses in Federal Court*, 27 WAKE FOREST L. REV. 829, 831-42 (1992) (providing an historical, substantive, and procedural overview of the entrapment defense); Michael DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory, and Application*, 1 U.S.F. L. REV. 243, 244-52 (1967) (overviewing the common law development of the doctrine).

¹⁴ See, e.g., *United States v. Gonzalez*, 19 F.3d 1169, 1172-73 (7th Cir. 1994).

¹⁵ Consensual or "victimless" crimes are defined as those in which the criminal is the only party to the crime as opposed to crimes in which a party is included without consent. BLACK'S LAW DICTIONARY 1567-68 (6th ed. 1990). Since there is no incentive for the involved parties to report these crimes, law enforcement officials frequently use undercover agents (either officials operating incognito or confidential informants acting under the instruction of government officials) to catch the criminals in a "sting" operation. It is these sting operations that give rise to the defense of entrapment. If a defendant has committed an offense which involves an undercover government agent, the defense of entrapment may be available (provided the elements of the defense are met). If a defendant has committed exactly the same offense without any government involvement, the defense of entrapment is generally not available, although a possible defense of "private," "derivative," or "vicarious" entrapment has been recognized in dicta. See *United States v. Manzella*, 791 F.2d 1263, 1269-70 (7th Cir. 1986) (recognizing an imaginable defense of vicarious entrapment but basing its holding on another issue) (citing *United States v. Cruz*, 783 F.2d 1470 (9th Cir.), *cert. denied*, 476 U.S. 1174 (1983)); *United States v. Leroux*, 738 F.2d 943, 947-48 (8th Cir. 1984); *United States v. McLernon*, 746 F.2d 1098, 1108-09 (6th Cir. 1984). But see *United States v. Twigg*, 588 F.2d 373, 376-80 (3d Cir. 1978) (allowing the entrapment defense for one defendant who was brought into a criminal enterprise by a government informant while denying it to a second defendant who was brought into the enterprise by the first defendant).

¹⁶ See, e.g., *Jacobson v. United States*, 503 U.S. 540, 542 (1992); *United States v. Gendron*, 18 F.3d 955, 960 (1st Cir.), *cert. denied*, 115 S. Ct. 269 (1994).

¹⁷ See, e.g., *Mathews v. United States*, 485 U.S. 58, 59-62 (1988); *United States v. Sandoval*, 20 F.3d 134, 136-39 (5th Cir. 1993).

¹⁸ See, e.g., *United States v. Hollingsworth*, 9 F.3d 593, 595-96 (7th Cir. 1993).

¹⁹ See, e.g., *United States v. Eldeeb*, 20 F.3d 841, 842-43 (8th Cir.), *cert. denied*, 115 S. Ct. 269 (1994).

²⁰ *Gendron*, 18 F.3d at 960.

"To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."²¹ A court must evaluate where that line is to be drawn based on the facts of each case by focusing on the individual defendant's predisposition.²²

The entrapment defense is supported by two distinct rationales. The first is that persons should not be held liable for acts they would not have committed without encouragement from the government.²³ A second is that the government ought to spend its resources stopping crime rather than encouraging people to commit it.²⁴ These rationales have translated into two definitions of the entrapment defense: the subjective approach,

²¹ *Sherman v. United States*, 356 U.S. 369, 372 (1958).

²² Since the focus of the defense is on the defendant's predisposition, not the conduct of the government, merely setting a trap or providing an opportunity to commit a crime is not entrapment. In *United States v. Russell*, 411 U.S. 423 (1973), the Supreme Court reiterated its holdings in *Sorrells v. United States*, 287 U.S. 435, 441 (1932) and *Sherman*, 356 U.S. at 372.

[Those cases] both recognize "that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." Nor will the mere fact of deceit defeat a prosecution, for there are circumstances when the use of deceit is the only practicable law enforcement technique available. It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.

Russell, 411 U.S. at 435-36 (quoting *Sherman*, 356 U.S. at 372 (quoting *Sorrells*, 287 U.S. at 441)).

²³ This statement represents the current federal law, discussed *infra* notes 25-30 and accompanying text, otherwise referred to as the subjective approach. The most recent Supreme Court ruling on the defense was in *Jacobson v. United States*, 503 U.S. 540 (1992). The majority in *Jacobson* stated that the defense is applicable "[w]hen the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law." *Id.* at 553-54. Judge Learned Hand, speaking for the court in *United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933), stated: "The whole doctrine derives from a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise resist." *Id.* at 1009.

²⁴ This statement summarizes the view taken by minorities of the Supreme Court in *Mathews v. United States*, 485 U.S. 58, 68-73 (1988) (White, J., dissenting); *United States v. Russell*, 411 U.S. 423, 436-50 (1973) (Douglas & Stewart, JJ., dissenting); *Sherman*, 356 U.S. at 378-85 (Frankfurter, J., dissenting); by the drafters of the MODEL PENAL CODE § 2.13 (1985); and by many states. See PAUL MARCUS, THE ENTRAPMENT DEFENSE (1989). Marcus' work also encompasses the defense of Outrageous Government Conduct, discussed *infra* notes 51-144 and accompanying text. The defense of entrapment is not envisioned by the Supreme Court as a control on government conduct. *Russell*, 411 U.S. at 433-34.

which is the current federal law, and the objective approach, which is a persistent dissenting view.

B. The Subjective Approach: Focus and Rationale

The Supreme Court has consistently upheld a subjective definition of the entrapment defense.²⁵ Under the subjective approach, the government must show that a particular defendant was predisposed to commit the offense before, and independent of, the government's action.²⁶ The defense exists to allow a defendant to avoid conviction when the defendant's original criminal intent was implanted by the government.²⁷ To support this theory, courts have found an implied congressional intent in criminal statutes to avoid conviction of the defendant when the effect of government conduct has been the manufacture of crime.²⁸

²⁵ *Jacobson*, 503 U.S. at 548-49 (reaffirming the view of the defense first enunciated in *Sorrells*, 287 U.S. at 441); *Mathews*, 485 U.S. at 62 (reaffirming the view of the defense first enunciated in *Sorrells*); *Hampton v. United States*, 425 U.S. 484, 488-91 (1975) (plurality opinion) (holding that the defendant did not establish entrapment where a government agent supplied contraband to a predisposed defendant); *Russell*, 411 U.S. at 429 (rejecting the defense when the defendant was predisposed to commit the crime); *Sherman*, 356 U.S. at 376 (finding entrapment as a matter of law where "the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted") (footnote omitted); *Sorrells*, 287 U.S. at 451-52 (stating that predisposition and criminal design of the defendant are relevant to the "controlling question whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials").

²⁶ *Jacobson* defined predisposition to include only that which the defendant had before any action on the part of the government to induce the conduct. 503 U.S. at 550-54. For a discussion of elements, see *infra* notes 35-50 and accompanying text.

²⁷ The court has repeatedly declined to overturn the subjective test. See, e.g., *Hampton*, 425 U.S. at 488-89 (quoting *Russell*, 411 U.S. at 429) (citations omitted):

In *Russell*, . . . [w]e reaffirmed the principle of *Sorrells v. United States* and *Sherman v. United States* that the entrapment defense "focus[es] on the intent or predisposition of the defendant to commit the crime," rather than upon the conduct of the Government's agents. We ruled out the possibility that the defense . . . could ever be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established.

²⁸ A Constitutional basis for the defense of entrapment was suggested in the Court's opinion in *Sherman*, 356 U.S. at 372 (stating that stealth and strategy are necessary and permissible law enforcement weapons, but when the criminal design originates with the government, they "become as objectionable police methods as the coerced confession and the unlawful search.").

The Supreme Court has consistently insisted that the defense of entrapment does not exist to "give the federal judiciary a 'chancellor's foot veto' over law enforcement practices of which it did not approve."²⁹ The current law has both supporters and critics.³⁰

C. The Objective Approach: Focus and Rationale

Early in the development of the defense, a minority of the Supreme Court concluded that the focus of the defense should not be the individual defendant's subjective predisposition to commit the crime. Rather, the focus should be on the intrusiveness of the government's conduct. This approach has come to be known as the objective test for entrapment.³¹

Under this view, entrapment occurs when an ordinary person would have been enticed to commit the offense by the conduct of the government agent.³² The main distinction between the two approaches is that

However, the Supreme Court has repeatedly based its subjective approach on this implied legislative intent. *See, e.g., Russell*, 411 U.S. at 435:

[E]ntrapment is a relatively limited defense. It is rooted, not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been 'overzealous law enforcement,' but instead in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the government.

²⁹ *Russell*, 411 U.S. at 435 ("[Although the lower courts have expanded the holdings of *Sorrells* and *Sherman*] . . . to bar prosecutions because of what they thought to be . . . 'overzealous law enforcement' [practices] . . . the defense of entrapment enunciated in those opinions was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve.").

³⁰ For criticism and support of the subjective approach as it has developed in the federal courts, see MARCUS, *supra* note 24, ch. 2; Leslie Abramson & Lisa Lindeman, *Entrapment and Due Process in the Federal Courts*, 8 AM. J. CRIM. L. 139 (1980) (analysis by court level and circuit); Louis Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111, 117-19 (topical analysis of the various formulations of the entrapment defense).

³¹ Justice Roberts described an objective test for entrapment in his dissenting opinion in *Sorrells*, 287 U.S. at 454-55 (Roberts, J., dissenting). Justice Frankfurter labeled the test "as objective a test as the subject matter permits" in his concurrence, joined by Justices Douglas, Harlan, and Brennan, in *Sherman*, 356 U.S. at 384 (Frankfurter, J., concurring).

³² *Sherman*, 356 U.S. at 384.

the predisposition of the defendant is irrelevant under the objective approach while under the subjective approach, it is all important.³³ The current federal law is that the focus should rest on the subjective predisposition of the defendant, but strong opposition to that view remains.³⁴

³³ S. REP. NO. 307, *supra* note 10, at 126-27 (footnotes omitted) compares and contrasts the two approaches:

A comparison of the competing views of the entrapment defense as they have emerged . . . reveals a considerable area of common ground Under either theory, for example, entrapment may result only from governmental inducement; inducement . . . by a private person does not establish the defense. Similarly both [approaches] recognize that undercover activity, artifice, stratagem, as well as the mere furnishing of an opportunity or facility to commit an offense, do not constitute unlawful entrapment. Where the two theories differ almost exclusively is on the question whether predisposition of the defendant is an element of the defense. While this difference may result in divergent conclusions being reached as to the availability of the defense in certain factual settings, it is relatively rare for Federal agents to engage in active inducement beyond the level that would cause a normally law-abiding person to be unable to resist commission of an offense.

. . . .

Since, under the [subjective approach] the entrapment defense is not constitutionally rooted but reflects a judicial determination of Congress' implicit intent in enacting penal statutes not to entrap individuals, it follows that Congress may . . . construe certain statutes . . . as not allowing the defense.

³⁴ For example, MODEL PENAL CODE § 2.13 (1985) adopted the objective approach to the entrapment defense. Subsection (1) provides that the defense is available when a law enforcement official or person acting in cooperation with such an official induces or encourages another person to engage in conduct constituting an offense by either "(a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (b) employing methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." Subsection (2) states that a defendant "shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the [c]ourt in the absence of the jury." Subsection (3) disallows the defense where "causing or threatening bodily injury is an element of the offense charged" and the defendant causes or threatens bodily injury to someone other than the official who perpetrates the entrapment. For rationale, historical analysis, and procedural implications of this section, see MODEL PENAL CODE § 2.13 commentary (1985).

For support and criticism of the objective approach and a comparison to the subjective approach, see Bennett, *supra* note 13, at 833-38; Scott Paton, Note, "*The Government Made Me Do It*": A Proposed Approach to Entrapment Under *Jacobson v. United States*, 79 CORNELL L. REV. 995, 1029-31 (1994).

D. *Elements of the Defense*

The entrapment defense has two elements.³⁵ These elements are 1) a government agent induced the defendant to commit the offense, and 2) the defendant was not predisposed to commit it.³⁶ Once the defendant raises some evidence of inducement, the burden of proof shifts to the government to prove that the defendant was predisposed to commit the offense.³⁷

1. *Government Inducement*

Inducement to commit an offense may be proper or improper.³⁸ Proper inducement occurs when a government agent merely provides an opportunity to commit an offense, makes commission of the offense easier, or participates in the conduct that the offense requires.³⁹ Mere

³⁵ The Supreme Court has defined the defense as consisting of two elements in, for example, *Mathews v. United States*, 485 U.S. 58, 62-63 (1988). For pattern jury instructions employing the subjective test, see *infra* note 39.

³⁶ *Mathews*, 485 U.S. at 62-63. *But see* *United States v. Hollingsworth*, 9 F.3d 593, 598-602 (7th Cir. 1993) (identifying lack of "readiness" or lack of a demonstrated, present ability to commit the offense as a new element of the defense and distinguishing that element from predisposition); *United States v. Rodriguez*, 858 F.2d 809, 812 (1st Cir. 1988) (stating that the two elements of the defense are "inducement and unreadiness") (citing *United States v. Polito*, 856 F.2d 414, 416 (1st Cir. 1988)).

³⁷ *Hampton v. United States*, 425 U.S. 484, 488-89 (1976) (plurality opinion). See MARCUS, *supra* note 24, § 6.05 (describing the quantum of evidence required to shift the burden of proof to the government).

³⁸ *Sherman v. United States*, 356 U.S. 369, 372 (1958); *United States v. Gendron*, 18 F.3d 955, 961 (1st Cir.), *cert. denied*, 115 S. Ct. 654 (1994) (citing *United States v. Coady*, 809 F.2d 119, 122 (1st Cir. 1987); *United States v. Espinal*, 757 F.2d 423, 425 (1st Cir. 1985); *Sorrells v. United States*, 287 U.S. 435, 441 (1932)).

³⁹ See, e.g., 1 FEDERAL CRIMINAL JURY INSTRUCTIONS § 4.04 (Comm. of Federal Criminal Jury Instructions of the Seventh Circuit ed., 1980); MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 9.01 (Comm. on Model Criminal Jury Instructions Within the Eighth Circuit ed., 1994); MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT § 6.02 & cmt. (Comm. on Model Jury Instructions, Ninth Circuit ed., 1992); PATTERN CRIMINAL JURY INSTRUCTIONS § 6.03(4) (Comm. on Pattern Criminal Jury Instructions, Sixth Circuit District Judges Ass'n ed., 1991); PATTERN JURY INSTRUCTIONS, CRIMINAL CASES, WITH ANNOTATIONS AND COMMENTS § 9 (Comm. on Pattern Jury Instructions, District Judges Ass'n, Eleventh Circuit ed., 1985); see S. REP. NO. 307, *supra* note 10, at n.177. ("This does not mean that every time a person is entrapped by a government official the defense is available. The public servant must be acting in an official capacity, offering inducements for a legitimate law enforcement purpose rather than in aid of a criminal frolic of his own such as a bribe.") (citing *United States v. Barker*, 546 F.2d 940, 960-61

repetition of offers of opportunities to commit an offense does not exceed the scope of proper inducement efforts.⁴⁰ Improper inducement, on the other hand, occurs when government conduct exceeds the mere provision of an opportunity to commit the offense and includes a further step to encourage the commission of the offense.⁴¹ If the defendant were predisposed to commit the offense, however, the defense is ultimately unavailable regardless of the inducement offered by the agent.⁴²

2. *Lack of Predisposition*

To overcome a showing of improper inducement, the government must show that the defendant was willing to commit the offense independent of any action taken by the government. If the defendant was

(D.C. Cir. 1976) (Leventhal, J., dissenting); *Malatkofski v. United States*, 179 F.2d 905, 917-18 (1st Cir. 1950)).

⁴⁰ *Sorrells v. United States*, 287 U.S. 435, 441 (1932) (citing five Supreme Court cases and other cases for the proposition that government agents may offer opportunities or facilities for the commission of an offense without barring prosecution).

⁴¹ *Gendron*, 18 F.3d at 961-62; MODEL PENAL CODE § 2.13(1)(b) (1985), *cited in Gendron*, 18 F.3d at 962. For other examples, see *United States v. Russell*, 411 U.S. 423, 429-30 (1973); *Sherman*, 356 U.S. at 376; *Sorrells*, 287 U.S. at 442-43; *United States v. Rodriguez*, 858 F.2d 809, 812-15 (1st Cir. 1988).

The distinction between proper and improper inducement is not necessarily an intuitive one.

Examples of official conduct held *not* to constitute entrapment as a matter of law have been the following:

- (1) decoy letters soliciting the mailing of obscene material;
- (2) using a decoy letter containing money to trap an embezzling postal employee;
- (3) undercover purchase of contraband;
- (4) supplying essential ingredient or facility, which may be difficult to obtain, for commission of offense;
- (5) feigning interest in a bribe offer;
- (6) offer of bribe to officer suspected of corruption in an amount not exceeding the degree of temptation to which he would normally be exposed;
- (7) use of a contingent fee arrangement to pay informers;
- (8) informer's mention to defense counsel of his relationship to prospective juror, precipitating suggestion that juror be corruptly approached;
- (9) allowing completed delivery of intercepted contraband or incriminating evidence, where defendant set the chain of events in motion;
- (10) failing to remove a corrupt officer so as to preclude a bribe offer.

S. REP. NO. 307, *supra* note 10, at 128 (footnotes omitted).

⁴² *Hampton v. United States*, 425 U.S. 484, 488-89 (1976) (plurality opinion). *See Seidman*, *supra* note 30.

predisposed to commit the offense before the government agent induced its commission, the defense is unavailable.⁴³

The Supreme Court clarified this element in *Jacobson v. United States*.⁴⁴ In that child pornography case, the defendant received repeated invitations and inquiries from several fictitious organizations.⁴⁵ He was also invited to place orders with several businesses.⁴⁶ Many of the communications from the bogus organizations employed by the government referred to freedom of speech and censorship.⁴⁷ The Court held that Jacobson's conviction for receiving child pornography could not be upheld because the government had not shown that Jacobson "was predisposed, independent of the Government's acts and beyond a reasonable doubt, to violate the law by receiving child pornography through the mails."⁴⁸ In other words, by the time he committed the

⁴³ *Hampton*, 425 U.S. at 488-89. See Seidman, *supra* note 30.

⁴⁴ 503 U.S. 540 (1992). The *Jacobson* decision did not invent the requirement that the government must prove predisposition independent of government action. See *id.* at 549 n.2. For a discussion of this holding in the context of prior Supreme Court decisions describing the predisposition element, see Paton, *supra* note 34.

⁴⁵ The Court paid particular attention to the spirit of the communications sent to Jacobson by the government. The bogus organizations were: "the American Hedonist Society" (an organization with the doctrine that "members had the 'right to read what we desire, the right to discuss similar interests with those who share our philosophy, and . . . the right to seek pleasure without restrictions being placed on us by outdated puritan morality'"). *Jacobson*, 503 U.S. at 543; "Midlands Data Research" (which sought information from people who "'believe in the joys of sex and the complete awareness of those lusty and youthful lads and lasses of the neophyte [sic] age'"), *id.* at 544; "Heartland Institute for a New Tomorrow" (a lobbying organization with the goal "to repeal 'all statutes related to regulation of sexual activities'"), *id.*; "Produit Outouais" (a "Canadian" mail order company), *id.* at 546; and "Far Eastern Trading Company, Ltd." (offering to avoid the "prying eyes of U.S. Customs" by sending materials through the mail via "American solicitors"), *id.* at 546-47.

The Court stated:

[T]he strong arguable inference is that, by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited petitioner's interest in sexually explicit materials banned by law but also exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and the infringement of individual rights.

Id. at 552.

⁴⁶ Jacobson had been targeted for investigation because, at a time when such materials were legal, he had ordered pornographic materials from a bookstore, and his name appeared on a postal inspector's list because it had been on that bookstore's mailing list. *Id.* at 543.

⁴⁷ See *supra* note 45.

⁴⁸ *Jacobson*, 503 U.S. at 554.

offense Jacobson had already been so inundated by governmental inducement that he had been made predisposed to commit the offense by that inducement.⁴⁹ Thus, the government must prove that a defendant was: 1) predisposed to commit the offense; and 2) so predisposed before any government action inducing the commission of the offense.⁵⁰

II. THE DUE PROCESS DEFENSE OF OUTRAGEOUS GOVERNMENT CONDUCT

A. *Historical Background*

The theory behind the due process defense is that conduct by the government could be so unreasonable and unfair that it violates the defendant's Constitutional due process right.⁵¹ This defense has not been accepted by all the circuits, and is rarely successful in those circuits that do accept it.⁵² In the circuits that accept the due process defense, it may be supported by showing either 1) that the defendant's right to due process has been violated or 2) by appealing to the court's general supervisory powers to curtail the overreaching of law enforcement officials that it finds shocking.⁵³

In 1952, the Supreme Court addressed due process concerns about the conduct of law enforcement officials in *Rochin v. California*.⁵⁴ In *Rochin*, law enforcement officers acting with "some information that [the defendant] was selling narcotics" entered a defendant's home where they saw the defendant put two capsules in his mouth.⁵⁵ The officers "attempted to extract the capsules" and when that proved unsuccessful, they took him to a hospital where "[a]t the direction of one of the officers a doctor forced an emetic solution through a tube into Rochin's stomach

⁴⁹ *Id.*

⁵⁰ See *United States v. Gendron*, 18 F.3d 955, 961-62 (1st Cir.) (comparing another child pornography case to Jacobson on the predisposition element), *cert. denied*, 115 S. Ct. 654 (1994); see also Seidman, *supra* note 30, at 118-20.

⁵¹ *United States v. Russell*, 411 U.S. 423, 431-32 (1973).

⁵² For a circuit-by-circuit analysis of this defense up to 1980, see Abramson & Lindeman, *supra* note 30.

⁵³ *Hampton v. United States*, 425 U.S. 484, 496 (1976) (Brennan, J., dissenting) (plurality opinion); *United States v. Russell*, 411 U.S. 423, 431-32 (1973) (Rehnquist, J., concurring); *United States v. Simpson*, 813 F.2d 1462, 1465 n.2 (9th Cir.), *cert. denied*, 484 U.S. 898 (1987).

⁵⁴ 342 U.S. 165 (1952).

⁵⁵ *Id.* at 166.

against his will."⁵⁶ Following this procedure, the officers recovered two morphine capsules in the vomited matter.⁵⁷ These two capsules were the principal evidence used to convict Rochin.⁵⁸ The conviction was affirmed by the intermediate appellate state court even though the officers had illegally entered the defendant's home, beaten him, and taken him to the hospital.⁵⁹

The California Supreme Court declined to hear Rochin's appeal, but two members of that court, dissenting to the denial, noted that such conduct by law enforcement officers would have resulted in exclusion of any resulting verbal confession.⁶⁰ The United States Supreme Court unanimously reversed the conviction, but based its holding on due process grounds rather than on analysis of the illegal search and seizure.⁶¹ After considering the difficulty of defining due process precisely,⁶² the Court recognized that, in this case, the conduct of the officers was simply so shocking that it violated Constitutional protections of due process.⁶³ The Court stated: "It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach."⁶⁴ The Court completed the analogy of the forced stomach pumping to forced confessions by comparing the rationales for exclusion in both situations.

Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of society.⁶⁵

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 166-67.

⁶⁰ *Id.* at 167 (quoting *Rochin v. People*, 225 P.2d 913, 917-18 (Cal. 1952)).

⁶¹ *Id.* at 168 ("This Court granted certiorari because a serious question is raised as to the limitations which the Due Process Clause of the Fourteenth Amendment imposes on the conduct of criminal proceedings by the [s]tates." (citations omitted)).

⁶² *Id.* at 169-72.

⁶³ *Id.* at 172.

⁶⁴ *Id.* at 173.

⁶⁵ *Id.* at 173-74. See MARCUS, *supra* note 24, at 273 ("Many commentators and judges have argued that the analysis in *Rochin* is not limited to violations of privacy or even the kind of brutal tactics used by the police there. Instead, it is argued that this analysis should apply to all contacts between government officers and private citizens

Finally, the Court was careful to narrow its holding to the officers' conduct in that case.⁶⁶

In 1973, the Supreme Court left the door open for an entrapment-like defense based on due process violations by law enforcement officers.⁶⁷ In *United States v. Russell*, an undercover government agent assigned to locate a suspected methamphetamine lab approached Russell.⁶⁸ The agent supplied an essential and rare chemical used in the production of the drug.⁶⁹ Russell was convicted after asserting an entrapment defense and on appeal argued that, even though a reasonable jury could have found him predisposed to commit the offense, there was entrapment as a matter of law.⁷⁰ The court of appeals focused on the government agent's level of participation in the offense in reversing the conviction.⁷¹

Before the Supreme Court, Russell urged the adoption of an exclusionary rule based on a revised constitutional defense of entrapment since "the same factors that led this Court to apply the exclusionary rule to illegal searches and seizures and confessions should be considered here."⁷² The Court was unpersuaded, however, since the government's conduct in that case "violated no independent constitutional right of the respondent. Nor did [the agent] violate any federal statute or rule or commit any crime in infiltrating the respondent's drug enterprise."⁷³ Russell also urged a per se rule to "preclude any prosecution when it is shown that the criminal conduct would not have been possible had not an undercover agent 'supplied an indispensable means to the commission of the crime that could not have been obtained otherwise, through legal or illegal channels.'"⁷⁴ The Court declined to adopt this suggested rule as well and stated:

Even if we were to surmount the difficulties attending the notion that due process of law can be embodied in fixed rules, and those attending respondent's particular formulation, the rule he proposes would not

. . . .") (citing Edward Mascolo, *Due Process, Fundamental Fairness, and Conduct that Shocks the Conscience: The Right Not to Be Enticed or Induced to Crime by Government and its Agents*, 7 W. NEW ENG. L. REV. 1, 35-36 (1984)).

⁶⁶ *Rochin*, 342 U.S. at 174.

⁶⁷ *United States v. Russell*, 411 U.S. 423, 431-32 (1973).

⁶⁸ *Id.* at 425.

⁶⁹ *Id.* at 426.

⁷⁰ *Id.* at 427.

⁷¹ *Id.*

⁷² *Id.* at 430 (citations omitted).

⁷³ *Id.*

⁷⁴ *Id.* at 431 (citation omitted).

appear to be of significant benefit to him . . . [because], on the record presented, it appears that he cannot fit within the terms of the very rule he proposes [since the chemical the agent supplied is not impossible to obtain and the defendant had in his possession two bottles of it that were not supplied by the agent].

. . . .

*While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . the instant case is distinctly not of that breed.*⁷⁵

Although the Russell Court left open the possibility of a due process defense, that possibility was significantly limited three years later in *Hampton v. United States*.⁷⁶ In *Hampton*, the defendant conceded a predisposition to distribute heroin.⁷⁷ The three member plurality of the Court found that predisposition renders both the entrapment defense and a due process defense unavailable under *United States v. Russell*.⁷⁸ The two concurring members found that *Russell* did not preclude a due process defense when defendants were predisposed, but that the facts of this case did not require reversal.⁷⁹ Three members dissented on the rationale that an entrapment defense focusing on the conduct of the government would be more appropriate than a subjective approach, and that under the former, the conviction would be reversed.⁸⁰ Thus, a total of five members of the Court held that a defense based on the Due Process Clause, though not supported here, had not been precluded by the Court's holding in *Russell* and did not exclude predisposed defendants.⁸¹

The status of the law has not changed. The Supreme Court has left the door open for the use of the due process defense but has never been presented with facts that support it. A few lower court cases expressly recognize the defense.⁸² On the other hand, one circuit has expressly

⁷⁵ *Id.* at 431-32 (emphasis added).

⁷⁶ 425 U.S. 484 (1976) (plurality opinion).

⁷⁷ *Id.*

⁷⁸ *Id.* at 485 (opinion of Rehnquist, J., with Burger, C.J., & White, J.).

⁷⁹ *Id.* at 493-94 (Powell & Blackmun, JJ., concurring).

⁸⁰ *Id.* at 495-500 (Brennan, Stewart, & Marshall, JJ., dissenting).

⁸¹ MARCUS, *supra* note 24, at 277-78.

⁸² See, e.g., *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1986); *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973).

rejected any possibility of the defense.⁸³ The defense is frequently raised but seldom successful.⁸⁴

B. *The Due Process Defense Versus Entrapment*

The due process defense and the defense of entrapment could easily arise from the same facts⁸⁵ but are two distinct defenses.⁸⁶ Entrapment is an affirmative defense focusing primarily on the predisposition of the defendant as determined by a jury.⁸⁷

The defendant who asserts a due process claim, on the other hand, asks the court to overturn a conviction or dismiss an indictment based on the government's actions, notwithstanding the defendant's own predisposition.⁸⁸ In fact, the due process claim is often not even viewed as a defense, since technically, it is generally raised in a preliminary motion to dismiss the indictment.⁸⁹ Whether the defendant's due process right has been violated is a question of law to be decided by the court.⁹⁰

⁸³ *United States v. Tucker*, 28 F.3d 1420 (6th Cir. 1994) (holding that the defense could not prevail for three reasons: *Hampton* effectively overruled the dictum in *Russell*; the court lacked authority to exercise its supervisory powers where no independent constitutional right was violated; and there were constitutional separation of powers concerns).

⁸⁴ See Tim A. Thomas, Annotation, *What Conduct of Federal Law Enforcement Authorities in Inducing or Co-Operating in Criminal Offenses Raises Due Process Defense Distinct from Entrapment*, 97 A.L.R. FED. 273, 285 (1990).

⁸⁵ For example, the principle case from which the defense is derived, *United States v. Russell*, 411 U.S. 423 (1973), was one in which the defendant raised both the defense of entrapment and the claim of a due process violation. Both claims were also raised in *United States v. Jenrette*, 744 F.2d 817 (D.C. Cir. 1984) (one of many Abscam cases).

⁸⁶ See, e.g., *United States v. Sneed*, 34 F.3d 1570, 1576-77 (10th Cir. 1994) ("The outrageous governmental conduct defense is distinct from the entrapment defense because [the latter] considers the predisposition of the defendant to commit the crime. In contrast, [the former] looks only at the government's conduct" (citations omitted)); Marcus, *supra* note 3, at 457. The due process defense is also distinct from the "objective approach." See *supra* notes 31-34 and accompanying text. While both defenses focus on the behavior of government officials, the due process defense is based on constitutional protections, while the objective entrapment defense relies on the general supervisory powers of the court.

⁸⁷ See *supra* notes 35-50 and accompanying text.

⁸⁸ *United States v. Luttrell*, 923 F.2d 764 (9th Cir. 1991) (en banc), *cert. denied*, 503 U.S. 959 (1992).

⁸⁹ *United States v. Bogart*, 783 F.2d 1428, 1432 n.2 (9th Cir. 1986).

⁹⁰ Marcus, *supra* note 3, at 458-59 (citing *United States v. Graves*, 556 F.2d 1319,

C. *When the Defense is Raised*

The Supreme Court has never approved a defense based on due process violations resulting from government overreaching. In view of the Supreme Court's reluctance, "the lower federal courts have been sparing in their approval."⁹¹ The defense has been raised in offenses involving, *inter alia*: drugs;⁹² child pornography;⁹³ bribery;⁹⁴ bootlegging;⁹⁵ escape from prison;⁹⁶ credit card fraud;⁹⁷ mail and wire fraud;⁹⁸ counterfeiting;⁹⁹ currency reporting violations;¹⁰⁰ sale, possession, transportation, or exportation of explosives, weapons, and firearms;¹⁰¹ food stamp fraud;¹⁰² theft, burglary, and conversion;¹⁰³ fish and game violations;¹⁰⁴ extortion;¹⁰⁵ criminal contempt;¹⁰⁶ jury tampering;¹⁰⁷ illegal transportation of aliens,¹⁰⁸ and arson.¹⁰⁹

1322 (5th Cir. 1977) (due process claim is a question of law for the judge), *cert. denied*, 435 U.S. 923 (1978)).

⁹¹ Thomas, *supra* note 84, at 279.

⁹² See, e.g., *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978).

⁹³ See, e.g., *United States v. Boffardi*, 684 F. Supp. 1263 (S.D.N.Y. 1988), *aff'd*, 872 F.2d 1022 (2d Cir. 1989).

⁹⁴ See, e.g., *United States v. Roland*, 748 F.2d 1321 (2d Cir. 1984).

⁹⁵ See, e.g., *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971).

⁹⁶ See, e.g., *United States v. Williams*, 791 F.2d 1383 (9th Cir.), *cert. denied*, 479 U.S. 869 (1986).

⁹⁷ See, e.g., *United States v. Zambrano*, 776 F.2d 1091 (2d Cir. 1985).

⁹⁸ See, e.g., *United States v. Leroux*, 738 F.2d 943 (8th Cir. 1984).

⁹⁹ See, e.g., *United States v. Russo*, 540 F.2d 1152 (1st Cir.), *cert. denied*, 429 U.S. 1000 (1976).

¹⁰⁰ See, e.g., *United States v. So*, 755 F.2d 1350 (9th Cir. 1985).

¹⁰¹ See, e.g., *United States v. Caron*, 615 F.2d 920 (1st Cir. 1980).

¹⁰² See, e.g., *United States v. Parisi*, 674 F.2d 126 (1st Cir. 1982).

¹⁰³ See, e.g., *United States v. Brown*, 635 F.2d 1207 (6th Cir. 1980).

¹⁰⁴ See, e.g., *United States v. Engler*, 806 F.2d 425 (3d Cir. 1986), *cert. denied*, 481 U.S. 1019 (1987).

¹⁰⁵ See, e.g., *United States v. Haimowitz*, 725 F.2d 1561 (11th Cir.), *cert. denied*, 481 U.S. 787 (1984).

¹⁰⁶ See, e.g., *United States ex rel. Vuitton et Fils, S.A. v. Karen Bags, Inc.*, 602 F. Supp. 1052 (S.D.N.Y.), *aff'd*, 780 F.2d 179 (2d Cir. 1985), *rev'd on other grounds*, 481 U.S. 787 (1987).

¹⁰⁷ See, e.g., *United States v. Quinn*, 543 F.2d 640 (8th Cir. 1976).

¹⁰⁸ See, e.g., *United States v. Valdovinos-Valdovinos*, 588 F. Supp. 551 (N.D. Cal.), *rev'd on other grounds*, 743 F.2d 1436 (9th Cir. 1984), *cert. denied*, 469 U.S. 1114 (1985).

¹⁰⁹ See, e.g., *United States v. Beverly*, 723 F.2d 11 (3d Cir. 1983).

Among the many law enforcement strategies that defendants argue violate their constitutional due process right, but which courts nonetheless uphold, are the following: initiating contact with a target to offer opportunities to commit a crime;¹¹⁰ full circle stings;¹¹¹ using a relative, sexual partner, or close friend as a government agent to convince the target to commit an offense;¹¹² promises of legitimate and profitable business deals;¹¹³ instigating a conspiracy;¹¹⁴ facilitating or encouraging a conspiracy and actually committing the offense;¹¹⁵ giving contraband to a defendant so that it can be exchanged for other contraband;¹¹⁶ threatening a defendant or his friends;¹¹⁷ and deciding to refer a case for prosecution to federal authorities rather than state authorities, in the absence of a policy to do so.¹¹⁸

D. *When the Defense Succeeds*

Defendants have prevailed in remarkably few cases by using a due process defense in the lower federal courts.¹¹⁹ In determining whether

¹¹⁰ See, e.g., *United States v. Goodwin*, 854 F.2d 33 (4th Cir. 1988).

¹¹¹ A "full circle sting" is one in which a government agent supplies contraband to the target, who then resells it to another agent. These are typically used in narcotics cases but are not limited to drug sales. See, e.g., *Willis v. United States*, 530 F.2d 308 (8th Cir.), *cert. denied*, 429 U.S. 838 (1976). But see *United States v. West*, 511 F.2d 1083 (3d Cir. 1975) (holding that a full circle sting violates due process).

¹¹² See, e.g., *United States v. Smith*, 802 F.2d 1119 (9th Cir. 1986).

¹¹³ See, e.g., *United States v. Rivera*, 778 F.2d 591 (10th Cir. 1985).

¹¹⁴ See, e.g., *United States v. Rodriguez-Ramos*, 704 F.2d 17 (1st Cir. 1983).

¹¹⁵ See, e.g., *United States v. Arias-Diaz*, 497 F.2d 165 (5th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

¹¹⁶ See, e.g., *United States v. Davis*, 809 F.2d 1194 (6th Cir.), *cert. denied*, 483 U.S. 1007 (1987).

¹¹⁷ See, e.g., *United States v. Johnson*, 565 F.2d 179 (1st Cir. 1977), *cert. denied*, 434 U.S. 1075 (1978).

¹¹⁸ See, e.g., *United States v. Langston*, 970 F.2d 692 (10th Cir.), *cert. denied*, 113 S. Ct. 439 (1992).

¹¹⁹ For every reported case in which a court of appeals has allowed the defense, there is at least one example of a case with similar facts in which another federal court has not allowed the defendant to prevail. See *Thomas*, *supra* note 84; see also *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978) (holding that due process was violated where government agents suggested setting up the operation, supplied equipment, expertise, a location, and raw materials to the defendant at no cost and with very little participation on the part of the defendant); *United States v. West*, 511 F.2d 1083 (3d Cir. 1975) (holding a "full circle" narcotics sting intolerable and reversing the defendant's conviction, but failing to label the rationale as one based on due process); *Greene v. United States*, 454 F.2d 783, 787 (9th Cir. 1971) (reversing conviction on account of government

law enforcement officials violated due process, some courts consider factors such as whether the defendant instigated the criminal enterprise or was drawn in by a government agent and whether the defendant was responsible for directing the enterprise.¹²⁰ However, these factors are not universally accepted by the circuits and no list of factors has been announced by the Supreme Court.

E. Targeting of Defendants

One controversial aspect of this defense is whether a defendant may be targeted for investigation in the absence of a particular level of suspicion. Criminal defendants have frequently proposed such a requirement.¹²¹ However, none of the circuit courts that have addressed this issue have held that a demonstrable level of suspicion is required by due process.¹²² In other words, the fact that the defendant was chosen as a

"enmeshment" in the criminal enterprise which the court found "repugnant to American criminal justice"); *United States v. Gardner*, 658 F. Supp. 1573 (W.D. Pa. 1987) (dismissing an indictment on due process grounds where an undercover agent persuaded a non-predisposed, fellow postal worker to obtain cocaine by using their friendship and repeatedly asking for the favor; noting that the defendant made no profit on the sales and had no other customers.); *United States v. Batres-Santolino*, 521 F. Supp. 744 (N.D. Cal. 1981) (dismissing an indictment due to the conduct of an undercover agent who set up a cocaine importation operation and promised defendants that profits from drug sales would only be used in legitimate business deals; focusing on the complete inability of the defendants to carry out the offense without the agent who organized the illegal activity.). *But see supra* notes 110-18 and accompanying text.

¹²⁰ See *MARCUS, supra* note 24, ch. 7 (identifying factors, such as instigation by the defendant, active vs. passive participation, control over the criminal enterprise, and noting which circuits have used these factors).

¹²¹ See cases cited *infra* note 122, in which the courts of appeals rejected any requirement for government targeting of an individual.

¹²² See, e.g., *United States v. Blevins*, 960 F.2d 1252, 1258 (4th Cir. 1992) (rejecting a requirement of reasonable suspicion before a defendant may be targeted in a sting operation but basing this holding on the fact that the focus of the *entrapment* defense is on the defendant's subjective predisposition, making the government's knowledge of such predisposition irrelevant); *Jannotti*, 673 F.2d at 608-09 ("Where the conduct of the investigation itself does not offend due process, the mere fact that the investigation may have been commenced without probable cause does not bar the conviction of those who rise to its bait."), *cert. denied*, 457 U.S. 1106 (1982); *United States v. Myers*, 635 F.2d 932 (2d Cir.) (sting operations are not prohibited by the Constitution), *cert. denied*, 449 U.S. 956 (1980); *United States v. DeVore*, 423 F.2d 1069, 1071 (4th Cir. 1970); *Kadis v. United States*, 373 F.2d 370 (1st Cir. 1967) (declining to rule that entrapment exists where inducement was offered without a showing of predisposition). The *Blevins* court relied on *United States v. Luttrell*, 923 F.2d 764 (9th Cir. 1991) (en banc), *cert. denied*, 503 U.S. 959 (1992); *United States v. Jenrette*, 744 F.2d 817, 824 & n.13 (D.C. Cir.

target for a sting prior to any suspicion of wrongdoing does not constitute outrageous conduct that rises to a level of violating due process.

The Supreme Court has never directly addressed the question of whether due process requires that the government demonstrate some level of suspicion before targeting an individual in a sting. The Court declined to examine this question when it accepted *Jacobson*,¹²³ its most recent entrapment case, for review. The original Eighth Circuit panel in that case reversed the conviction because the government agents had not targeted the defendant based on reasonable suspicion.¹²⁴ On rehearing, the panel upheld the conviction because the mere lack of a reasonable basis to target the defendant did not violate due process and because the defendant was not entrapped.¹²⁵ The opinion issued by the Supreme Court addressed only the question of whether *Jacobson* had been entrapped as a matter of law.¹²⁶

In *United States v. Luttrell*,¹²⁷ the Ninth Circuit held that the government could not target a defendant in a sting operation without a showing of reasonable suspicion.¹²⁸ That opinion, however, was vacated

1984); *United States v. Gamble*, 737 F.2d 853, 860 (10th Cir. 1984).

See also *United States v. Osborne*, 935 F.2d 32, 36 (4th Cir. 1991) ("In this circuit the contrary principle has been fixed in the law for almost 70 years and is still viable." (citing authority from that circuit holding "that the government need not have reasonable grounds to suspect illegal conduct before offering the opportunity to commit a crime" (citations omitted)); *United States v. Allibhai*, 939 F.2d 244, 249 (5th Cir. 1991) ("We also join our sibling circuits in rejecting the suggestion . . . that the government should have reasonable suspicion that an individual is involved in some illegality before targeting him in a sting operation."); *Luttrell*, 923 F.2d at 764 (rejecting a "reasoned grounds" requirement for investigation of an individual under the due process clause); *Jenrette*, 744 F.2d at 824 (holding that failure to demonstrate reasonable suspicion of the defendant before targeting in a sting did not constitute a violation of due process); *Gamble*, 737 F.2d at 860 ("We have held that the government need not have a reasonable suspicion of wrongdoing in order to conduct an undercover investigation of a particular person." (citations omitted)).

¹²³ *Jacobson v. United States*, 503 U.S. 540 (1992).

¹²⁴ *United States v. Jacobson*, 893 F.2d 999 (8th Cir. 1990), *vacated*, 899 F.2d 1549 (1991).

¹²⁵ *United States v. Jacobson*, 916 F.2d 467 (8th Cir. 1990), *cert. granted in part, rev'd*, 503 U.S. 540 (1992).

¹²⁶ *Jacobson*, 503 U.S. at 547-48 n.1 (explaining how the holding in *Jacobson* applies to the government's burden of showing predisposition before any inducement).

¹²⁷ 889 F.2d 806 (9th Cir. 1989), *vacated in part*, 923 F.2d 764 (1991) (en banc) (original conviction was for conspiracy to possess and traffic in unauthorized and counterfeit credit card drafts and for attempt to traffic in counterfeit drafts), *cert. denied*, 503 U.S. 959 (1992).

¹²⁸ *Id.* at 814. The three-member panel would have remanded the case for trial since

on rehearing en banc.¹²⁹ In the three-member panel opinion, the court had imposed a pre-targeting reasonable suspicion requirement and had criticized "suspicionless investigations" as being "inefficient" and "arbitrary."¹³⁰ However, the three-member panel's opinion was subsequently vacated en banc without any specific rationale offered by the panel. The Ninth Circuit simply stated that it would, by rejecting a "reasoned grounds" requirement, "follow four of our sister circuits."¹³¹ In dissent, Circuit Judge Pregerson stated that purposeful criminal investigation is required by the Bill of Rights, that targeting a defendant without reasonable suspicion is itself outrageous government conduct, and that informants should not be allowed to "go out on fishing expeditions to find targets for undercover sting operations."¹³²

F. Contingent Fee Arrangements

Another area of interest is the use of paid informants as government agents in sting operations. The concern is that a conviction based on evidence supplied by a paid informant, who is eager to earn consideration, may violate the due process rights of the target of the investigation, when that consideration is based on the informant's performance in the operation.¹³³

In the three-member panel opinion issued by the *Luttrell* court,¹³⁴ the court also focused on the role of confidential informants who "have a strong incentive to find targets for police investigations."¹³⁵ The court examined the dangers of using paid informants as follows:

there were indications in the record that the Secret Service might have had a sufficient basis for targeting the defendants, but the record was not fully developed. By vacating the panel opinion en banc, the Ninth Circuit clearly stated that there is no such requirement in that circuit.

¹²⁹ *United States v. Luttrell*, 923 F.2d 764, 764 (9th Cir. 1991) (en banc).

¹³⁰ *Luttrell*, 889 F.2d at 814.

¹³¹ *Luttrell*, 923 F.2d at 764 (en banc).

¹³² *Id.* at 764-65 (Pregerson, J., dissenting).

¹³³ *United States v. Solorio*, 37 F.3d 454 (9th Cir. 1994) (recognizing the defense where the informer was paid based on the number of persons convicted, the quantity of drugs involved, and the value of assets seized). For a discussion of the traditional view of informants with contingent fee arrangements, see MARCUS, *supra* note 24, § 7.08 (noting that the claim is generally raised with regard to drug offenses and citing *United States v. Porter*, 764 F.2d 1 (1st Cir. 1985), where the court focuses on society's legitimate interest in stopping drug trafficking as typical); *see also* Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 197 (1976).

¹³⁴ *See supra* notes 127-32 and accompanying text.

¹³⁵ *Luttrell*, 889 F.2d at 808, 813 (informant was paid by the government "to solicit prospective clients for illegal credit card draft deals . . . [while] awaiting sentencing for a credit card fraud conviction.").

[I]n this case, the investigation utilized the services of an informant, a member of a group that in its eagerness to gain rewards does not always obey the niceties of police protocol. Many informants play their roles because of completed or prospective plea bargaining arrangements. They have a strong incentive to find targets for police investigation, regardless of the reasonableness or the accuracy of their information. Their tips to the police may be based either on legitimate information about the criminal underworld or they may be wholly fabricated. The origin of the information may be direct observation or it may be innuendo, conjecture or even just plain animus. While in some cases informant activities may be conducted in a fair and decent manner, in others there appears to be little regard for fundamental concepts of honesty and fair play. We see substantial reason to scrutinize these operations for governmental overreaching and to do so with the greatest care.¹³⁶

A recent Ninth Circuit opinion, *United States v. Solorio*,¹³⁷ addressed this question. In that case, the court was initially under the impression that the agent was paid based on the number of persons convicted, the quantity of drugs involved, and the value of assets seized.¹³⁸ The court held that the government's conduct was a violation of the defendant's due process right because the evidence on which the conviction was based was likely to be unreliable.¹³⁹ However, the court withdrew its original opinion based on a motion by the United States.¹⁴⁰ The Ninth Circuit subsequently re-issued the opinion, but failed to find the outrageous governmental conduct discussed in its original decision.¹⁴¹ The court failed to find outrageous governmental conduct in its second opinion because a review of the record convinced the court that the agent had not been paid a contingency fee based on convictions, but rather a contingency fee based on "successful" investigations.¹⁴² The Ninth Circuit stated: "Because the record does not establish that the informant's fee arrangement was contingent upon obtaining convictions, we cannot say that, under the totality of the circumstances, [the defendant] was subjected to outrageous government conduct."¹⁴³ From this

¹³⁶ *Id.* at 813-14.

¹³⁷ 37 F.3d 454 (9th Cir. 1994).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Solorio*, 43 F.3d 1334 (9th Cir. 1995).

¹⁴¹ *Solorio*, 53 F.3d 341, 1995 WL 242324 (9th Cir. 1994).

¹⁴² *Solorio*, 1995 WL 242324, at *3.

¹⁴³ *Id.* at *4.

language it is logical to infer that the Ninth Circuit would consider the reverse to be proof of outrageous governmental conduct. It should be noted that when the Court issued its revised opinion, it chose not to publish it,¹⁴⁴ and under Ninth Circuit Rule 36-3, unpublished opinions are not precedential and should not be cited.

III. THE FUTURE OF THE DUE PROCESS DEFENSE

A. *United States v. Tucker: The Sixth Circuit Speaks*

In *United States v. Tucker*,¹⁴⁵ the Sixth Circuit took a step beyond all other federal courts when it plainly stated that the defense of outrageous government conduct simply does not exist in the Sixth Circuit. The defendants in *Tucker* were indicted for purchasing, and aiding and abetting the purchase of food stamps.¹⁴⁶ The defendants were targeted in a reverse sting operation by an "operative" working for the government whose compensation was half the money she collected from the illegal sale of the food stamps.¹⁴⁷ The operative, Hancock, had been a friend of the defendant, Tucker, for more than ten years.¹⁴⁸ Hancock contacted Tucker and attempted to induce Tucker to buy food stamps from her by describing her financial distress. Hancock told her friend how she hoped to provide a "proper Christmas" for her children.¹⁴⁹ Tucker resisted at first, but then agreed to the purchase after Hancock appeared at Tucker's business dressed as if she were in dire financial straits.¹⁵⁰ Tucker then encouraged Hancock to contact McDonald, Tucker's employee. After listening to Hancock's story, McDonald also agreed to purchase Hancock's food stamps.¹⁵¹

The district court dismissed the indictment because the offense of trafficking in food stamps did not justify the ploys used in the investigation.¹⁵² The court held that there would be no problem with such individual tactics as using undercover agents, targeting of an agent's friends, paying an agent, or using deceptive ploys.¹⁵³ However, it held

¹⁴⁴ *Solorio*, 53 F.3d at 341.

¹⁴⁵ 28 F.3d 1420 (6th Cir. 1994).

¹⁴⁶ *Id.* at 1421.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

that “when they are employed in totality with people who are not otherwise suspected of engaging in crime . . . the conduct . . . crosses [the constitutional] boundary.”¹⁵⁴

The Sixth Circuit reviewed the dismissal *de novo*.¹⁵⁵ The court began by examining the entrapment defense, and noted that the objective approach to entrapment had been clearly rejected by the United States Supreme Court in *Russell*.¹⁵⁶ The court also stated that the language so often cited in support of the proposition that the door has been left open for a due process defense was plainly dicta.¹⁵⁷

The court noted that the Sixth Circuit has been presented with more than two dozen cases in which the defense has been raised, but that “on the facts” the defense has been rejected every time.¹⁵⁸ Thus, according to the majority:

[T]here is no authority in this circuit which holds that the government’s conduct in inducing the commission of a crime, if “outrageous” enough, can bar prosecution of an otherwise predisposed defendant under the Due Process Clause of the Fifth Amendment. . . . [The cases cited] do nothing more than “assume” the existence of such a defense while “holding” that it would not apply under the present facts. . . . [T]he legal existence of . . . [the] “due process” defense is an open question in this circuit which we are free to address in the first instance.¹⁵⁹

The court next examined authority in other circuits, concluding that only one other appellate court has barred a prosecution under *Russell* and that holding improperly relied on an earlier Third Circuit case which had been limited by other Third Circuit holdings.¹⁶⁰ The other circuits had

¹⁵⁴ *Id.* (alteration in *Tucker*) (citation omitted).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1423; see *supra* notes 67-84 and accompanying text.

¹⁵⁸ *Tucker*, 28 F.3d at 1424. For examples of the Sixth Circuit’s previous holdings in which the defense was offered by defendants, but rejected “on the facts,” see *id.*

¹⁵⁹ *Id.* at 1424-25 (citations omitted). But see *id.* at 1429 (Martin, J., concurring in result) (concurring in the result because the government’s conduct was not outrageous in this case, but stating that prior Sixth Circuit opinions recognizing the existence of an “outrageous government conduct” defense to criminal prosecution are binding authority and citing *United States v. Payne*, 962 F.2d 1228, 1231-33 (6th Cir.), *cert. denied*, 113 S. Ct. 306, *cert. denied*, 113 S. Ct. 811 (1992) as analyzing at length the four factors weighed by the Sixth Circuit in determining whether government conduct was outrageous, and rejecting the majority’s notion that such treatment by the Sixth Circuit itself is dicta).

¹⁶⁰ *Tucker*, 28 F.3d at 1425 (citing *United States v. Twigg*, 588 F.2d 373 (3d Cir.

proceeded just as the Sixth Circuit in applying the *Russell* dicta, and finding on every occasion that the facts did not bar prosecution.¹⁶¹

After concluding that there was no binding authority from the Supreme Court or the Sixth Circuit, the *Tucker* court held that the due process defense "simply does not exist" in the Sixth Circuit.¹⁶² The court concluded that a defendant who raises a defense based on inducement to commit the offense "is, by congressional intent and Supreme Court precedent, limited to the defense of entrapment and its key element of predisposition."¹⁶³ The *Tucker* holding has three bases. First, inducement does not itself violate due process even if it is "outrageous."¹⁶⁴ Second, the trial court lacks authority to dismiss an indictment on the basis of governmental misconduct unless an independent constitutional right has been violated.¹⁶⁵ Finally, the fact that this defense continues to exist "stands as an invitation to violate the constitutional separation of powers, intruding not only on the province of the Executive Branch but the Legislative Branch as well."¹⁶⁶

The first basis for the Sixth Circuit's holding is rooted in the concept that the entrapment defense is itself based on congressional intent and not the Due Process clause.¹⁶⁷ The *Tucker* court reasoned that since the entrapment defense is implied in congressional intent, Congress could choose not to allow such a defense.¹⁶⁸ Hypothetically, if Congress were to reverse the theoretical bar against convicting entrapped defendants, then even non-predisposed defendants could be convicted for crimes regardless of government inducement. Since due process would not be violated in such a case, "*a priori* it is not offended by convicting those who *are* predisposed."¹⁶⁹

The second basis for the *Tucker* court's holding was that an objective test for entrapment has been rejected by the United States Supreme Court, and the government did not violate an independent protected right of the defendant.¹⁷⁰ "[T]he balance between the desire to curb government

1978), which had relied on *United States v. West*, 511 F.2d 1083 (3d Cir. 1975), which had been limited by *Hampton* and other decisions).

¹⁶¹ *Id.*

¹⁶² *Id.* at 1426-27.

¹⁶³ *Id.* at 1428.

¹⁶⁴ *Id.* at 1427.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See *supra* note 28 and accompanying text.

¹⁶⁸ *Tucker*, 28 F.3d at 1427.

¹⁶⁹ *Id.*

¹⁷⁰ See *supra* text accompanying note 165.

inducement and the need to convict criminals is drawn at *predisposition*, not 'outrageousness.'"¹⁷¹ In other words, the outrageous government conduct defense is just another version of the objective entrapment test rejected by the Supreme Court. Since inducement by itself does not violate due process, no independent right of the defendant is violated. Therefore, even outrageous conduct by the government does not give the district court power to bar prosecution.¹⁷²

Finally, the Sixth Circuit held that the defense must be rejected on separation of powers grounds. The Executive Branch is answerable to the electorate for its conduct in inducing defendants to commit crimes.¹⁷³ Additionally, the Legislative Branch has implicitly limited the Executive Branch by prohibiting conviction of non-predisposed defendants where government action induced the commission of a crime.¹⁷⁴ The majority reasoned that courts have no power to oversee the conduct of law enforcement officials "[w]here no law has been broken [by the government] and none of the defendants' constitutional rights have been violated" because Congress has drawn the line at the defendant's subjective predisposition.¹⁷⁵

B. Why the Defense Should Not Disappear

A due process argument has not been necessary to remedy misconduct of law enforcement agents in certain important areas in which overreaching has been recognized to be harmful to society.¹⁷⁶ For example, evidence seized in violation of the Fourth Amendment, as well as evidence later obtained as a direct result of that illegal seizure, is not admitted at trial because it is in the interests of society to control searches by law enforcement agents.¹⁷⁷

In cases of outrageous overreaching by government agents, the federal courts ought to take action to curtail this behavior, as well. Society's interest in maintaining law enforcement and a court system free

¹⁷¹ *Tucker*, 28 F.3d at 1428.

¹⁷² *Id.* at 1427-28 (citing *United States v. Payner*, 447 U.S. 727 (1980); *Hampton v. United States*, 425 U.S. 484 (1976) (plurality opinion); *Rochin v. California*, 342 U.S. 165 (1952)).

¹⁷³ *Id.* at 1428.

¹⁷⁴ *Id.* (citing *Jacobson v. United States*, 503 U.S. 540, 548-49 (1992)).

¹⁷⁵ *Id.*

¹⁷⁶ Paul Marcus, *Toward an Expanded View of the Due Process Claim in Entrapment Cases*, 6 GA. ST. U. L. REV. 73, 74 (1989).

¹⁷⁷ *Id.* at 75.

of shocking conduct is just as compelling in a sting operation as it is in a search and seizure case. The Court in *Rochin* could have relied on the Fourth Amendment, but chose instead to focus on the overreaching by government agents that it found shocking.¹⁷⁸ Contrary to the Sixth Circuit's holding in *Tucker*, precedent has been set by the Court establishing that without reference to an independent Constitutional right, the guarantees of the Due Process clauses of the Fifth and Fourteenth Amendments justify limiting law enforcement conduct where society's interests in judicial integrity are at stake.

Besides the general interest in maintaining the integrity of the judicial system, society also has a compelling interest in avoiding prosecutions that target defendants capriciously. Whenever discretion lies in the hands of the police, there is at least a minimal risk that a person will be targeted for investigation based on political beliefs or lifestyle,¹⁷⁹ rather than in the interest of a legitimate law enforcement need. The government should not leave the choice of targets in the hands of confidential informants who act as agents in exchange for consideration, whether monetary or leniency in sentencing.¹⁸⁰ As the federal law now stands, there is simply no check on the discretion held by law enforcement officials and their agents to target defendants in sting operations.

Even if a defendant is targeted purely randomly, society cannot tolerate such targeting because it is an inefficient allocation of resources. Assume that an undercover sting to trap unwary *criminals* involves only the cost of encouraging criminals to commit the crimes. For example, in an undercover operation at a school, an agent offers to pay street value for drugs. Students who are already dealing drugs at the school might be caught by the sting. The cost of an undercover sting to trap unwary *innocents*, however, involves what logically must be a higher inducement since, by definition, innocents would not commit crime under the conditions in which criminals normally would. As a logical consequence, only a very high purchase price would induce a student, who does not normally deal drugs, to do so on this occasion, and thereby be caught in the sting. Some of the costs of sting operations include the time it takes to convince the targets to participate in the sting, the complexity of sham organizations and businesses, and the creative efforts of law enforcement personnel in devising the schemes. In terms of these costs, if it takes

¹⁷⁸ *Id.* at 76.

¹⁷⁹ See Gershman, *supra* note 11 (proposing that the courts require some level of suspicion before targeting a suspect in a sting operation because of this danger).

¹⁸⁰ See *United States v. Luttrell*, 923 F.2d 764, 764-65 (1991) (en banc) (Pregerson, J., dissenting), *cert. denied*, 503 U.S. 959 (1992).

more to get innocents to commit the crime, naturally it would be more cost effective to society to target only criminals.

The problem is how to know beforehand whether an individual selected as a target in a sting is a criminal or an innocent. If law enforcement agents could only target a defendant in a sting after showing a particular level of suspicion, the costs of stings would go down in relation to the benefits. Sting operations are more likely to catch criminals than innocents when they start by targeting a defendant who is already suspected of wrongdoing. Since stings that catch criminals cost less than stings that catch innocents, society would benefit by having resources allocated more efficiently.

C. A Substantive Solution

The Supreme Court should impose a requirement that before the government may target a defendant in a sting operation, a showing of reasonable suspicion must be made.¹⁸¹ Such a standard would not substantially impede law enforcement. It would serve the interests of judicial integrity and of cost-effective law enforcement. Judicial imposition would relieve the legislature of its duty to codify the protection of unpopular interests. Finally, it would not be against precedent to impose such a requirement since the door was left open by the Court's holding in *Jacobson*.

Imposition of a reasonable suspicion standard would not impede effective law enforcement. Law enforcement officials should not be required to meet a stricter probable cause requirement or to seek a warrant because that would interfere with the practical requirements of infiltrating criminal enterprises. However, merely requiring that government agents demonstrate that they have chosen a target for a valid reason, as opposed to a hunch, a prejudice, or some otherwise invalid personal reason, would not impede valid law enforcement efforts since, presumably, the majority of defendants are only targeted after reasonable suspicion exists. An effective remedy for a failure by the government to make a sufficient showing where the defendant was targeted without reasonable suspicion would be suppression of the evidence gathered in such a sting operation.

A requirement of reasonable suspicion would protect society's legitimate interests. The courts would be shielded from the taint of

¹⁸¹ The scope of this section is limited to a substantive discussion of a reasonable suspicion requirement, and does not address the procedural ramifications of the rule suggested.

overreaching because a reasonable basis standard would inhibit some shocking conduct by agents. This is clearest in the case of informants acting as agents. These agents would become subject to closer scrutiny by the law enforcement officials who use them since they would also need a reasonable basis for choosing targets.

The legislature should codify this requirement but will not because the current trend is toward cracking down on criminals. No legislator interested in continued employment wants to go on record as supporting the rights of criminal defendants, especially criminal defendants who assert that they actually committed the conduct and subsequently want to be relieved of punishment. Therefore, the Court is in a unique position to impose a requirement of reasonable suspicion before a defendant may be targeted.

The Sixth Circuit held, in *Tucker*, that since (1) the entrapment defense is based on Congressional intent, not the Constitution, and (2) Congressional intent can be changed without violating the Constitution, the Constitution is not violated by government overreaching.¹⁸² This reasoning assumes too much. The mere fact that the traditional justification of the entrapment defense has evolved along the lines of Congressional intent rather than Constitutional lines does not conclusively prove that the Constitution is not offended by government overreaching to convict a predisposed defendant. This specious theoretical basis for the holding in *Tucker* does not support eliminating a Constitutional defense which draws a line at outrageousness rather than at predisposition.

The Supreme Court would not need to rule against precedent to impose a reasonable suspicion requirement now. Based on its holdings in *Rochin*, *Russell*, and *Hampton*, the door has been left open for a defense based on due process that would be available to defendants regardless of predisposition.¹⁸³ Since the court decided *Jacobson* without ruling on a reasonable suspicion requirement, that issue has been left open.

In fact, the Court's holding in *Jacobson* could be read as a broad requirement of reasonable suspicion before the government targets a defendant in a sting operation. Such a reading would side-step the separation of powers issue raised by the Sixth Circuit in *Tucker* and

¹⁸² See *supra* notes 167-69 and accompanying text.

¹⁸³ *Rochin v. People of Calif.*, 342 U.S. 165, 173-74 (1952); *United States v. Russell*, 411 U.S. 423, 431-32 (1973) ("While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process would absolutely bar the government from invoking judicial processes to obtain a conviction . . . the instant case is distinctly not of that breed."); *Hampton v. United States*, 425 U.S. 484, 489 (1976) (plurality opinion).

would promote efficient law enforcement by way of the courts. *Jacobson* requires that the government show that a defendant was predisposed before any action by an agent to induce the commission. Logically, a showing of predisposition must be based on at least some evidence of conduct manifesting that predisposition. If the Court intended the lower courts to require a particular level of suspicion, it chose language that was too subtle to convey that message. But there is still time to correct this problem, given the many, many criminal defendants who appeal indictments and convictions on the basis of the due process defense. The Supreme Court should review the very next one of those cases and explicitly impose the reasonable suspicion requirement described.

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